(1) Supreme Court, U.S.
FILED
991452 JAN 10 2000
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

ANTHONY DANIELE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether counsel's simultaneous representation of a criminal defendant in a post-trial motion for new trial, and in an ongoing related civil trial can be so interwoven that counsel's deficient performance in the civil proceeding can so taint counsel's performance in the post-trial criminal matter, as to constitute ineffective assistance of counsel?

II. Whether Mr. Daniele's ineffective assistance of counsel claim should be remanded to the United States Court of Appeals for the Eighth Circuit for reconsideration in light of this Court's recent decision in *Mitchell v. United States*, ___ U.S. ___, ___ S.Ct. ___, 143 L.Ed.2d 424 (1999)?

LIST OF PARTIES

Petitioner Anthony Daniele was the only petitioner-appellant in the courts below. Respondent United States of America was the only respondent-appellee in the courts below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Anthony Daniele, pro se, respectfully requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit affirming the district court's judgment is reported as *Daniele v. United States*, F.3d ___ (8th Cir. 1999) (unpublished) (Pet. App. A-39). The Memorandum and Order of the United States District Court for the Eastern District of Missouri, adopting the Magistrate's Report and Recommendation to dismiss Mr. Daniele's Petition on the merits (Pet. App. A-40), and the Magistrate's lengthy Report & Recommendation (Pet. App. A-1), are unreported.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered judgment on October 18, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND RULE PROVISIONS INVOLVED

This case involves the following constitutional, and rule provisions as set forth herein:

> AMENDMENT VI: In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.
>
> AMENDMENT V: No person shall . . . be compelled in any criminal case to be a witness against himself.

. . .

RULE 33, Fed.R.Crim.P.: On a defendant's Motion, the court may grant a new trial to that defendant . . . based on newly discovered evidence. . . .

STATEMENT

The Prosecution and Sentencing of Petitioner

Donald Anton, one of Mr. Daniele's co-defendants, was a prominent and politically active attorney who orchestrated a conspiracy to defraud the St. Louis Police Retirement pension funds. See *United States v. Daniele*, 886 F.2d 1046, 1048 (8th Cir. 1989); *Anton v. United States*, No. 4:49 CV 1977 GFG, at 3 (E.D.Mo. 1988); *Anton v. Retirement of St. Louis*, 925 S.W.2d 900, 902 (Mo. App. 1996). Anton conspired with pension fund officials and brokers to steer financial transactions to certain individuals who would, in turn, make payoffs to Anton and the officials. Id. 886 F.2d at 1049.

Mr. Daniele was a patrolman on the St. Louis Metropolitan Police Department when, in September 1984, he ran for election to the Board of Directors of the Police Pension Fund (PPF). Although the government presented evidence that Daniele was supported by Anton in this bid, that appears to remain in question. Id. 886 F.2d at 1049 n. 6. In April 1985, Mr. Daniele became Chairman of the PPF. This move involved Anton's support as well as that of other political figures. The government produced evidence that Daniele indicated his desire for political assistance in being promoted to Sergeant.

During this period Anton was also lobbying to replace one management firm (Midwest) with another (ICI). An official from Midwest met with Daniele to see whether he had a preference for where brokerage went. Thereaf-

ter, Daniele successfully moved the PPF board to replace Midwest, and hours before Midwest received formal notice of this, it made unusual and large transactions, generating close to $100,000.00 in fees. Mr. Daniele later voted to open the management contract to competitive bids. Problems with the arrangements and the eleventh-hour trades lead the PPF board to plan a lawsuit against Midwest, and Mr. Daniele reported the firm to the Securities and Exchange Commission. Id. 886 F.2d at 1050-51, 1052 n. 17.

Mr. Daniele then met with an official from one of the management firms hired by PPF (Guaranty), who told staff they might "test the waters" to see if Guaranty would still be pressured to favor Anton's brokers. At the meeting, Daniele warned the official not to "test the waters."

In February 1986 Daniele heard from other sources about complaints of improprieties at Guaranty and reported them to a police commissioner, who was also on the PPF board. Id. 886 F.2d at 1051. Daniele shortly thereafter reported some of this information to federal investigators. As federal investigators closed in on Anton, he told a witness that he never made any payments to Daniele, but only tried to help him get a promotion. Id. at 1051-52. Anton said he believed Daniele was well-qualified anyway. Id. at 1052, n.15. Daniele continued to cooperate with police investigators.

The government conceded that it had no proof that Daniele received money from the kickback scheme. His intent, the government contended, was to receive political assistance in a promotion. Mr. Daniele contended that he did nothing for Anton but to support hiring a new management firm, in cooperation with other board members. Id. at 1052, n.17.

As the investigation wound down, in 1987, Mr. Daniele was indicted with six other co-defendants: Donald Anton, Aurora Anton (Anton's wife), Louis Monti, Executive Secretary of the Fire Pension Fund, Angelo Rato, Vice President of the Guaranty Trust Company one of the funds' money managers, Walter Kelin, former Chairman of the Police Pension Fund, Charles Swanger, a city employee and former Trustee of the fire Pension Fund.

Mr. Daniele was indicted in twenty-one counts of a twenty-six count indictment. Counts 1 through 16 charged violations of the mail fraud statute, 18 U.S.C. § 1341. Count 17 charged a general conspiracy in violation of 18 U.S.C. § 371; and Counts 18 through 21 charged violations of extortion and attempted extortion, 18 U.S.C. §§ 1951 and 1952. At trial on May 25, 1988, after opening statements, Anton elected to plead guilty to three of the twenty-four counts against him. After a two week trial, a jury found Mr. Daniele guilty of ten counts of mail fraud (18 U.S.C. §§ 1341 and 1342), one count of conspiracy (18 U.S.C. § 371) and four counts of extortion and attempted extortion (18 U.S.C. §§ 1951 and 1952).

Mr. Daniele was sentenced to eight years of imprisonment and ordered to pay $ 200,000.00 in restitution to the Pension Fund. Thereafter, Mr. Daniele appealed both his conviction and sentence, and the same was affirmed in all respects. See, *United States v. Daniele*, 886 F.2d 1046 (8th Cir. 1989).

Events Subsequent to Mr. Daniele's Sentencing

While the Court of Appeals upheld Daniele's conviction and sentence, the Court nevertheless, noted with concern that "the evidence against the defendant [Daniele] was by no means overwhelming." Id. 886 F.2d

at 1057. Ergo, the court went on by urging the district court "to consider carefully any motion for reduction of sentence" filed by Mr. Daniele." Id.

Other litigation ensued simultaneously with Mr. Daniele's criminal appeal, in the form of civil litigation. A civil suit was filed, *Police Retirement System v. Midwest Investment Services, et al.*, and was tried before the Honorable Stephen N. Limbaugh, Judge. Moreover, Daniele's criminal appeal and civil trial was being handled at the same time by Donald Wolff, a St. Louis attorney. Notwithstanding, and despite Mr. Daniele's criminal conviction, the jury sorted through the complicated evidence and found that Mr. Daniele did not as the former Trustee of the Fund, breach his fiduciary duty. Id. 940 F.2d 351 354 (8th Cir. 1991).

After the favorable verdict in the civil trial,[1] Mr. Daniele represented by Donald Wolff, filed a Motion for New Trial on the basis of newly discovered evidence from the civil trial; and moved for a reduction of his sentence pursuant to former Rule 35(b) Fed.R.Crim.P., before the Honorable William L. Hungate, Judge. The district court denied Mr. Daniele's bid for a new trial, but reduced his sentence by one year. Daniele than appealed to the United States Court of Appeals for the Eighth Circuit, and the court affirmed Judge Hungate's decision, with one exception. The court held that Anton's

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[1] While Mr. Daniele's direct criminal appeal was pending, Mr. Wolff also agreed to represent Mr. Daniele in preparing and presenting a Rule 33, motion for new trial. It was at this point that Mr. Wolff's adequate representation in the post-trial motion hinged on his adequate investigation and questioning of essential witness in the civil trial in an attempt to gather sufficient and relevant evidence for a new trial in the criminal matter.

restitution payment satisfied his and Daniele's joint and several obligations to the System, and remanded to the district court to amend the judgment by extinguishing Daniele's restitution obligation. See, *United States v. Daniele*, 931 F.2d 486 (8th Cir 1991).[2]

It was not until September 1, 1995, that Mr. Daniele first attempted further litigation to attack his conviction and sentence, when he filed a *pro se* Petition for Writ of Error Coram Nobis, after his release from prison. During the pendency of this petition, Mr. Daniele filed several frivolous motions, simply because he was acting pro se, and without the aid or assistance of competent legal assistance. Nevertheless, Mr. Daniele did eventually acquire the aid and assistance of a trained paralegal, willing to assist him in his legal quest for vindication. In February 1998, Mr. Daniele sought leave of the district court to file a "First Amended Petition for Writ of Error Coram Nobis." Together therewith, Mr. Daniele submitted his First Amended Petition, and an extensive Memorandum of Law. Mr. Daniele's claims were narrowed down to two primary issues: (1) that he was denied his Sixth Amendment right to effective assistance of counsel, as a result of counsel's failure to raise in his Motion for new trial, a

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[2] Despite the fact that the Eighth Circuit affirmed Judge Hungate's decision to deny Daniele's motion for new trial the court nevertheless, while concluding that Anton's closing statements in the civil trial were not testimony and therefore inadmissible. Notwithstanding, the court noted with interest: "We remain unclear why Daniele failed to challenge Anton's invocation of the privilege against self-incrimination during both the criminal and civil proceedings. Anton's guilty plea, which predates both trials, may have waived his right — at least as to matters that the guilty plea resolved." Id. 931 F.2d at 488 n.2.

claim of jury misconduct; and (2) ineffective assistance of counsel, as a result of counsel's failure to challenge Mr. Anton's invocation of his Fifth Amendment privilege against self-incrimination, in both the criminal trial, and civil trial while representing Daniele and gathering evidence for his post-trial, motion for new trial. Only the second claim was pursued during Mr. Daniele's appeal and the instant petition.

On September 30, 1998, the Honorable David Noce, United States Magistrate Judge, issued a thirty page Report and Recommendation, denying Mr. Daniele's claims on the merits; however, the magistrate completely failed to address Mr. Daniele's ineffective assistance of counsel claim regarding his post-trial representation, during the motion for new trial. On October 20, 1998, after having been granted an extension of time, Mr. Daniele timely filed his *pro se* Objections to the Magistrate's R & R. Finally, on December 3, 1998, in a summary Order, the Honorable Carol E. Jackson, United States District Judge, without addressing Mr. Daniele's extensive Objections, simply adopted Magistrate Noce's R & R denying Daniele's Petition for Writ of Error Coram Nobis.

Mr. Daniele timely filed his pro se notice of appeal and briefed extensively all issues properly preserved. Despite all of Mr. Daniele's efforts, on October 18, 1999, the United States Court of Appeals for the Eighth Circuit issued a summary opinion affirming the reasons set out in the magistrate's R & R (Pet. App. A-1).

REASONS FOR GRANTING THE WRIT

The decision below totally ignored existing precedent within the United States Court of Appeals for the Eighth Circuit, clearly declaring that a criminal defendant possess a Sixth Amendment right to effective assistance of counsel during a post-trial proceeding involving a motion for new trial. Moreover, Daniele's petition presents this Court with a unique opportunity to address a novel and fundamental Sixth Amendment question. Namely, whether the Sixth Amendment right to effective assistance of counsel in a post-trial proceeding, extends as well to issues of adequate investigation and interviewing of essential and relevant witness; as this right is essential to counsel's pre-trial investigation and interviewing of essential defense witnesses? A claim never before addressed by this Court.

On the merits, Mr. Daniele's ineffective assistance of counsel claim, if adopted by this Court, should be at a minimum remanded to the United States Court of Appeals for the Eighth Circuit, for reconsideration in light of this Court's recent holding in *Mitchell v. United States*, ___ U.S. ___, ___ S.Ct. ___, 143 L.Ed.2d 424 (1999) (holding that a defendant's Fifth Amendment privilege against self-incrimination does not extend beyond sentencing and the time for filing an appeal, nor does the privilege extend to civil proceedings).

I. THE EIGHTH CIRCUIT'S SUMMARY AFFIRMANCE OF THE DISTRICT COURT'S DENIAL OF MR. DANIELE'S PETITION FOR WRIT OF ERROR CORAM NOBIS, WITHOUT ADDRESSING DANIELE'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DURING HIS RULE 33, MOTION FOR NEW TRIAL, CLEARLY CONFLICTED WITH EXISTING PRECEDENT WITHIN THE EIGHTH CIRCUIT.

A. Whether counsel's simultaneous representation of a criminal defendant in a post-trial motion for new trial, and in an ongoing related civil trial can be so interwoven that counsel's deficient performance in the civil proceeding can so taint counsel's performance in the post-trial criminal matter, as to constitute ineffective assistance of counsel?

The Eighth Circuit in at least three separate opinions recognized that a criminal defendant possessed a Sixth Amendment right to effective assistance of counsel when preparing and presenting a "post-trial" motion for new trial. *Robinson v. Norris*, 60 F.3d 457, 460 (8th Cir. 1995); *Dawan v. Lockhart*, 980 F.2d 470, 474 (8th Cir. 1992); *Simons v. Lockhart*, 915 F.2d 372, 378 (8th Cir. 1990).

While it is true that each one of these decisions was based on an interpretation of a motion for new trial, pursuant to Ark.R.Crim.P. 36.4; which was subsequently replaced with a revised version of Ark.R.Crim.P. 37. That aside, is not dispositive of the relevancy to the facts of the instant case. For example, the Eighth Circuit

made abundantly clear that while this Court's decision in *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991), held that there is no constitutional right to postconviction counsel, notwithstanding, this did not limit the right to effective assistance of counsel post-trial, as distinct from postconviction. *Dawan*, 980 F.2d at 474 n.5.

Mr. Daniele's claim alleged that he received ineffective assistance of counsel during the preparation and presentment of his Rule 33 motion for new trial based on newly discovered evidence.

Rule 33, Fed.R.Crim.P. provides in relevant part as follows:

> A motion for new trial based on newly discovered evidence may be made only within three years after the verdict or finding of guilt. But if an appeal is pending, the court grant the motion only on remand of the case.

In *United States v. Schaffer*, 789 F.2d 682 (9th Cir. 1986), the government attempting to appeal the district court's decision to grant Schaffer's motion for new trial, pursuant to Fed.R.Crim.P. 33, based on newly discovered evidence. As an alternatively argument, the government argued that the Ninth Circuit possessed jurisdiction to entertain its appeal since the "government has a right to appeal from an order granting relief under 28 U.S.C. § 2255." Id. at 687 n.5. Interestingly enough, the court said "this right to appeal, simply has no application to the instant case." Id. The court further expressly rejected the government's argument because a motion pursuant to § 2255 and a motion pursuant to Rule 33, clearly evidences that "these two remedies are separate and distinct means of attacking a judgment." Id.

This court's reasoning is significant to Mr. Daniele's claim. Whereas, jurisprudence dictates that Daniele possessed no Sixth Amendment right to counsel postconviction, nevertheless, he did possess a Sixth Amendment right to effective assistance of counsel "post-trial," in preparation and presentment of his Rule 33, motion for new trial. *Robinson,* 60 F.3d at 460.

Having concluded that Daniele possessed a Sixth Amendment right to effective assistance of counsel during his "post-trial" motion for new trial. The focus thus turns on the question of whether counsel must conduct an adequate investigation of both the law and facts "post-trial," as he is required pre-trial based on Strickland's clear mandate.

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), this Court concluded that in order to render effective assistance of counsel, counsel owes a "duty to investigate" the "law and facts" of the case, so as to prepare an adequate defense and properly advise a client of his options. Id. 466 U.S. at 690, 80 L.Ed.2d at 695.

Law is an art, not a science, thus there must remain room for expansion and adoption of evolving legal principles as life's canvas is altered by complex legal issues. Ergo, if we are to give content and meaning to the Sixth Amendment right to effective assistance of counsel in the post-trial context, it must impose an equal duty as well upon counsel as it does pre-trial, that includes the duty to investigate both the law and facts relevant to the clients claims.

Turning to the specific facts of Mr. Daniele's claim this Court is faced with a unique factual scenario. Donald Wolff, who represented Mr. Daniele during his

criminal trial, also continued as counsel during Daniele's direct criminal appeal. Simultaneously, while Daniele's direct criminal appeal was pending, Mr. Wolff also represented Mr. Daniele in the civil trial brought against him and others, and directly related to the facts of the criminal trial. However, here is where the legal waters become a little murky. Mr. Wolff also agreed to represent Mr. Daniele in his bid for a new trial in the criminal case *via* a Rule 33, motion for new trial. As part of his strategy in preparing the motion for new trial, Mr. Wolff was going to use the civil trial as a means of interviewing witnesses and gathering newly discovered evidence which was not reasonably available to him during the criminal trial.

Mr. Daniele informed Wolff that Donald Anton, his co-defendant in the both the criminal and civil trials, if called as a defense witness could exonerate him. However, Mr. Anton during the civil trial successfully invoked his Fifth Amendment privilege against self-incrimination, and was not challenged by Mr. Wolff.

Lest there be any doubt, since Daniele possessed a Sixth Amendment right to effective assistance of counsel during his post-trial motion for new trial, *Robinson*, 60 F.3d at 460, that placed on Mr. Wolff the duty to conduct an adequate investigation of the "law and facts" surrounding Mr. Anton's invocation of his Fifth Amendment privilege in the civil trial. *Strickland*, 466 U.S. at 690, 80 L.Ed.2d at 695.

This is not to suggest, for even one minute, that the Sixth Amendment right to counsel extends to civil trials. See, *McCrum v. Elkhart County Dept. of Public Welfare*, 806 F.Supp. 203, 206 (N.D. Ind. 1992) ("No constitutional right to counsel exists in a civil case"); *Father & Sons Lumber & Bldg. Supplies v. N.L.R.B.*,

931 F.2d 1093, 1097 (6th Cir. 1991) (". . . the Sixth Amendment right to effective assistance of counsel, by the clear language of the amendment, does not apply to a civil matter.").

Significantly enough, Mr. Wolff not only represented Daniele as counsel in the civil trial, but he was acting in a dual capacity in that he was counsel also in the post-trial matter. Henceforth, it is difficult to distinguish Wolff's Sixth Amendment responsibilities to Daniele, since his representation in preparation for the motion for new trial so overlapped into his representation in the civil trial.

For example, despite Wolff's lack of an adequate defense in the criminal trial, the Eighth Circuit concluded that "the evidence against the defendant was by no means overwhelming." *Daniele*, 886 F.2d at 1057. This statement by the Eighth Circuit becomes significant in light of Anton's attempt to exonerate Daniele during his closing arguments in the civil trial, wherein Anton stated:

> Over there sit Tony Danielle [sic].
>
> He is in this case, in count 14.
>
> I am not in that count.
>
> I am in Counts 16 and 20, which are the counts making the allegations concerning me.
>
> This is the first time anywhere that anyone officially has publically [sic] acknowledged that Tony Danielle [sic] and I did not conspire to do anything.
>
> I had no participation in his election as a trustee.
>
> You heard that before.

> There was no agreement that he hire nor fire Guaranty Trust Company, nor Midwest Investment.
>
> There was no agreement between Tony and I that he use only I.M. [sic] Simon as a broker. I agreed to circulate his resume for promotion, since I sincerely believed that he had an excellent police record, and deserved to be promoted.
>
> And I gave it to anyone that I thought would listen.
>
> Unfortunately, he was not promoted.
>
> Neither, he, nor I had any promises or agreements that I would give him any money for doing anything, or he would give me any money for doing anything.
>
> In my opinion, he should not be liable in this case; and he should not even have been sued in this case.

Id. *Daniele*, 931 F.2d at 488.

These very statements Mr. Wolff attempted to utilize in his motion for new trial, as newly discovered evidence to exonerate Daniele in the criminal matter. However, the district court and the Eighth Circuit both found "that the above statements were not evidence. Given their context, we agree that Anton's comments can be fairly characterized as purely legal arguments based on the evidence at trial, and nothing more." Id. at 488-49.

Alternatively, had Mr. Wolff rendered effective assistance of counsel to Daniele, as required by the Sixth Amendment, in the post-trial context. He would have investigated the facts and law relevant to Anton's invocation of his Fifth Amendment privilege in the civil trial; and concluded that since Anton had already plead guilty

in the criminal trial, had been sentenced, and his time for appeal had elapsed thus making his conviction and sentence final by the time of the civil trial. Then as a general rule, that were there can be no further incrimination, there is no basis for the assertion of the privilege. As such, those principles apply to cases in which the sentence has been fixed and the judgment of conviction has become final. See, e.g., *Reina v. United States*, 364 U.S. 507, 513 (1960). Moreover, there was at the time of Daniele's civil trial "the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them," *Baxter v. Palmigiano*, 435 U.S. 308, 318 (1976), at least where refusal to waive the privilege does not lead "automatically and without more to [the] imposition of sanctions," *Lefkowitz v. Cunningham*, 431 U.S. 801, 808 n.5 (1977).

To put it in more simple terms, had Mr. Wolff provided the effective assistance of counsel owed to Daniele in his post-trial representation. He would have aggressively challenged in the civil trial Anton's invocation of his Fifth Amendment privilege,[3] and placed Anton on the stand as a defense witness. At least in this context, Wolff could have preserved as evidence any testimony by Anton in an attempt to exonerate Daniele of criminal liability; which would have then been relevant and admissible in Daniele's Rule 33, motion for new trial. Moreover, such evidence when viewed in light of the fact

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[3] Even the Eighth Circuit, when reviewing the denial of Daniele's motion for new trial, was perplexed as to why "Daniele failed to challenge Anton's invocation of the privilege against self-incrimination during both the criminal and civil proceedings." Id. 931 F.2d at 488 n.2.

that the "evidence against [Daniele] was by no means overwhelming," id. 886 F.2d at 1075, thus casts a dark cloud of doubt over the government's case, and calls into serious question the validity of Mr. Daniele's conviction and sentence.

Based on the foregoing arguments, Mr. Daniele submits that this Court should grant certiorari to fully examine the scope of the Sixth Amendment right to effective assistance of counsel in a post-trial context. Especially in a situation where counsel's simultaneous representation of a criminal defendant in a post-trial motion for new trial, and in an ongoing related civil trial can be so intimately interwoven, that counsel's deficient performance in the civil trial can so taint counsel's performance in the post-trial criminal matter, as to constitute ineffective assistance of counsel.

Moreover, this Court should grant certiorari to consider this argument in light of the Seventh Circuit's recent decision in *Banks v. United States*, 167 F.3d 1082 (7th Cir. 1999). There Mr. Banks filed an application for leave to file a successive § 2255 motion. However, Mr. Banks could not meet the strict requirements of the gatekeeping provisions. Despite that this Court has clearly held that there is no constitutional right to counsel in a postconviction proceeding, *Pennsylvania v. Finely*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987), or the right to effective assistance of counsel in a postconviction proceeding, *Coleman*, 501 U.S at 752, 115 L.Ed.2d at 671. Notwithstanding, the Seventh Circuit concluded that Mr. Banks' application "contains allegations seriously challenging the integrity of his first habeas proceeding." Id. 167 F.3d at 1083. As such, the court suggested that the district court "has authority to reopen Mr. Banks' habeas case only if it finds that

counsel's conduct affected the integrity of its own proceedings." Id. Ergo, "Rule 60(b) is, however, an appropriate means to bring a claim that the conduct of counsel affected the integrity of the court's habeas proceeding." Id. at 1084.

Surely, if a petitioner can challenge the integrity of the district court's habeas proceeding, *via* Rule 60(b), based on counsel's ineffectiveness. Where there is no Sixth Amendment right to effective assistance of counsel in such a postconviction proceeding. Then Mr. Daniele's case presents an even more compelling argument; whereas, Daniele possessed a Sixth Amendment right to effective assistance of counsel in the post-trial, motion for new trial. However, counsel's simultaneous representation in an ongoing related civil proceeding, was so deficient, as to affect the integrity of the post-trial proceedings, thus constituting ineffective assistance of counsel. In addition, and significantly enough, Mr. Daniele's argument, if adopted by this Court, presents a colorable claim of factual innocence.

II. WHETHER MR. DANIELE'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM SHOULD BE REMANDED TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FOR RECONSIDERATION IN LIGHT OF THIS COURT'S RECENT DECISION IN *MITCHELL V. UNITED STATES*, ___ U.S. ___, ___ S.Ct. ___, 143 L.Ed.2d 424 (1999)?

Assuming arguendo, that this Court adopts Mr. Daniele's argument that he possessed a Sixth Amendment right to effective counsel in his post-trial, motion for new trial; and that as a result of his attorney's deficient performance in failing to challenge his co-

defendant, Donald Anton's invocation of his Fifth Amendment privilege in the civil trial, that this tainted his performance in the post-trial proceeding. Then Mr. Daniele's case should be remanded back to the Eighth Circuit for reconsideration in light of this Court's decision in *Mitchell*.

In *Mitchell*, this Court concluded that once a defendant's sentence and conviction becomes final, he no longer has a valid Fifth Amendment privilege against self-incrimination, at least in regards to matters concerning his conviction and sentence. Moreover, this Court further concluded that the Fifth Amendment privilege against self-incrimination generally does not extend to a civil trial.

Therefore, since Anton's conviction and sentence had become final by the time of his and Daniele's joint civil trial, Anton no longer possessed a valid Fifth Amendment privilege against self-incrimination in the civil trial. Wherefore, Mr. Daniele's claim of effective assistance of counsel in the post-trial context should be remanded for reconsideration in light of *Mitchell*.

CONCLUSION

WHEREFORE, Anthony Daniele, Petitioner, pro se, prays this Court for the reasons and authorities presented herein grant his petition for a writ of certiorari.

Respectfully submitted,

Pro Se: Anthony Daniele
12817 Spanish Road
St. Louis, Missouri 63138
(314) 355-5912

Dated: January 10, 2000.

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:95 CV 1658 CEJ

ANTHONY DANIELE,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

[Filed: September 30, 1998]

This action is before the Court for a recommended disposition of the first amended petition of Anthony Daniele for a writ of error coram nobis. The matter was referred to the undersigned United States Magistrate Judge under 28 U.S.C. § 636(b).

The action results from a criminal trial in 1988, where petitioner Daniele was convicted of ten counts of mail fraud, one count of conspiracy and four counts of extortion or attempted extortion. The prosecution came from an investigation into the management of the pension funds provided for disabled and retired members of the Fire and Police departments of the City of St. Louis, and their survivors. Other defendants indicted with Daniele either pled guilty or were not prosecuted as a result of these plea agreements. *See Police Retirement System of St. Louis v. Midwest Investment Advisory Svc., Inc.*, 940 F.2d 351, 354-55 (8th Cir. 1991). Ultimately, Daniele was sentenced to seven years imprisonment.

I.

As recounted in numerous past proceedings, the evidentiary record indicates that the scheme to defraud the pension funds began in 1982. Donald Anton, one of petitioner's co-defendants, was a prominent and politically active attorney who orchestrated the conspiracy to defraud the pension funds. *United States v. Daniele,* 886 F.2d 1046, 1048 (8th Cir. 1989); *Anton v. United States,* No. 4:94 CV1877 GFG, at 3 (E.D. Mo. 1998); *Anton v. Police Retirement System of St. Louis,* 925 S.W.2d 900, 902 (Mo. App. 1996). Anton conspired with pension fund officials and brokers to steer financial transactions to certain individuals who would, in turn, make payoffs to Anton and the officials. *United States v. Daniele,* 886 F.2d 1046, 1049 (8th Cir. 1989).

Petitioner Daniele was a patrolman on the St. Louis Metropolitan Police force when, in September 1984, he ran for election to the board of directors of the Police Pension Fund (PPF). Although the government presented evidence that Daniele was supported by Anton in this bid, that appears to remain in question. Resp. Mem. App. B at 7, 10; *United States v. Daniele,* 886 F.2d 1046, 1049 n.6 (8th Cir. 1989). In April 1985, petitioner Daniele became Chairman of the PPF. This move involved Anton's support as well as that of other political figures. The government produced evidence that Daniele indicated his desire for political assistance in being promoted to Sergeant.

Evidence from Anton's appointment book showed that Daniele met with Anton and others during a period when Anton was pressuring PPF money managers to send all their brokerage business to Anton's kickback partners. During this period Anton was also lobbying to

replace one management firm (Midwest) with another (ICI), and petitioner was, for a time, supportive of this. An official from Midwest met with petitioner to see whether he "had a preference for where the brokerage went." The official testified that Daniele replied "you know what the program is." The Midwest official concluded that Daniele was supporting Anton's pressure. *Daniele*, 886 F.2d at 1050. Daniele successfully moved the PPF board to replace Midwest, and hours before Midwest received formal notice of this, it made unusual and large transactions, generating close to $100,000.00 in fees. The Midwest official, who had become a government informant, testified that Daniele approved these trades. *Daniele*, 886 F.2d at 1050, n.8. Petitioner later voted to open the management contract to competitive bids. Problems with these arrangements and the eleventh-hour trades lead the PPF board to plan a lawsuit against Midwest, and petitioner reported the firm to the Securities and Exchange Commission. *Id.*, 886 F.2d at 1050-51, 1052 n.17. At this time, Daniele also supported several fellow officers in their unsuccessful election races for the PPF board and another organization. Anton offered campaign assistance, about which at least one officer was very suspicious. *Id.* at 1050.

Petitioner Daniele then met with an official from one of the other management firms hired by the PPF (Guaranty), who had told his staff they might "test the waters" to see if Guaranty would still be pressured to favor Anton's brokers. At the meeting, Daniele warned the official not to "test the waters." Since Anton had a conspirator on the official's staff, the government argued that this indicated Daniele was communicating with Anton and was acting to protect the scheme. *Id.* at 1051; Resp. Mem. App. B at 12.

In February 1986 Daniele heard from other sources about complaints of improprieties at Guaranty and reported them to a police commissioner, who was also on the PPF board. *Daniele*, 866 F.2d at 1051. Daniele shortly thereafter reported some of this information to federal investigators. However, at that point and in the course of assisting in PPF's own investigation, Daniele repeatedly denied that he knew Anton. *Id.*

As federal investigators closed in on Anton, he told a witness that he never made any payments to petitioner, but only tried to help him get a promotion. *Id.* at 1051-52. Anton said he believed Daniele was well-qualified anyway. Record evidence supported this. *Id.* at 1052, n.15. Although regarded as cooperative by police investigators, Daniele continued to make statements denying or minimizing his familiarity with Anton, in conflict with the numerous meetings noted in Anton's seized appointment calendar and testified to by a government witness. *Id.* at 1052.

The government conceded that it had no proof that Daniele received money from the kickback scheme. His intent, the government contended, was to receive political assistance in a promotion. Petitioner contended that he did nothing for Anton but to support hiring a new management firm, in cooperation with other board members. *Id.* at 1052, n.17.

At trial on May 25, 1988, after opening statements, Anton elected to plead guilty to three of the 24 counts against him; these were mail fraud conspiracy, extortion, and obstruction of justice. As part of the plea agreement, the government agreed to drop all additional charges against him and all charges against Anton's wife. *See Anton v. United States*, No. 4:94 CV

1877 GFG at 9 (E.D. Mo. 1998). The agreement would not go into effect, however, until sentencing, which was set for August 5, 1988. The civil case was pending. *See* Mov. Exh. 5 at 14-15, 18. Anton refused to testify on the grounds that he could incriminate himself.[1] After a trial of at least two weeks, Daniele was convicted. The record reflects that while petitioner's attorney cross-examined witnesses, no defense witnesses were called and no evidence was put forth by the defense. Petitioner was convicted of 15 counts and acquitted of six.

II.

Extensive litigation followed petitioner's conviction. Daniele appealed his conviction on a number of grounds. While the Eighth Circuit upheld the conviction, it found that evidentiary errors and some other problems did occur. First, petitioner was not allowed to introduce an inconsistent statement made by a government witness, the official from Midwest, which apparently indicated that petitioner had *not* approved the eleventh-hour trades. Nonetheless, since petitioner was allowed to cross-examine this witness, the error was ruled harmless. *Id.* at 1052-53. The Court specifically noted, however, that it was not expressing a view on how new evidence against Midwest (obtained in the civil trial) would affect Daniele's motion for a new criminal trial. *Id.* at 1053, n.19. This error was central to the liability

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[1] In his affidavit, filed in support of his first amended petition for a writ of error coram nobis, petitioner asserts that, although Anton pled guilty early in their joint criminal trial, petitioner understood that his defense counsel would still be able to question Anton to petitioner's benefit. However, petitioner states, he also learned that Anton had invoked his privilege against self-incrimination and petitioner understood Anton therefor could not be compelled to testify. *See* Daniele Aff. at 1-2.

of Midwest (the key issue in the civil trial), but was "not so central to the issue of Daniele's knowledge or intent that it is likely the judgment [of the jury] was substantially affected by it." *Id.* at 1057.

Second, petitioner was not allowed to introduce a videotape of one of the PPF board meetings which, he believed, would demonstrate that *all* of the board members initially agreed to hire ICI, the firm touted by Anton. Again, the Court found this was indeed admissible but was not reversible error, for four reasons: it could have been excluded as cumulative; the minutes of that meeting were admitted; a board member was available for cross-examination; and petitioner's counsel had failed to offer the trial court an evidentiary basis for overcoming the government's hearsay objection, stating "I don't know that I do [have a response]." *Id.* at 1053-54. On the appeal, petitioner argued, and the Court of Appeals agreed, that the basis should have been Fed. R. Evid. 803(24). *Id.*

Third, the official from Guaranty testified that he saw petitioner over a Fourth of July holiday, and stated that his (the witness's) date commented on the large bankroll of cash petitioner was holding. This testimony was hearsay and "unquestionably prejudicial." *Id.* at 1056. Although it should not have been allowed, the trial court instructed the jury to disregard it, and the Court of Appeals found no reversible error. *Id.*

Petitioner pointed out that his six other co-defendants began to plead guilty during the jury selection process and by the time the first witness was called, only petitioner remained to be tried. Petitioner argued on appeal that this timing was prejudicial, largely because the government was allowed "to highlight evidence in

its opening statement without having to connect that evidence to" petitioner.. *Id.* at 1055. The Court of Appeals ruled that the trial court's refusal to grant a mistrial was not an abuse of discretion. *Id.*

Finally, petitioner argued that he was prejudiced because the trial court agreed to allow the government to question him (subject to timely and relevant objections) on another matter if he took the stand to testify in his own defense; and, although defense counsel told the jury in his opening statement that Daniele would indeed so testify, this ruling foreclosed that option. Specifically, petitioner was worried that prosecutors would cross-examine him about a 1986 I.R.S. investigation of his alleged outside income. He had cooperated with federal investigators and had been assured that nothing he said would be used against him ,either directly or indirectly." *Id* at 1054. He was never charged with any offense related to the investigation. *Id.* While such cross-examination would generally have been prohibited under Fed. R. Evd. 404(b), and possibly Rule 403, the government argued that it related to petitioner's truthfulness and might have been admissible under Rule 608 (b). The Court of Appeals held that it was within the trial court's discretion to determine these questions as they came up, rather than entirely prohibit them at the outset. *Id.*

Ultimately, petitioner argued that he was never actually involved in the racket his co-defendants pled guilty to, and that he had no knowledge of the conspiracy or specific intent to defraud. The Eighth Circuit observed:

> There is evidence which supports defendant's position. There is no evidence defendant received any money from anyone as a result of the scheme, which started long before he became a member of the

Police Pension Board. There is evidence that defendant ran for the Board on a platform which disparaged the money managers involved in the scheme based on their poor performance and high commissions, and that his actions on the Board were consistent with the actions of other Board members who were also concerned about the managers' performance. Defendant supported the investigation of Midwest and reported them to the SEC, actions which were arguably against the interests of those involved in directing brokerage through Midwest. Defendant also appeared to have been responsible for bringing the allegations of Harry Barr to the attention of Commissioner Frank, and cooperated with Frank in investigating the allegations made by Barr against Guaranty Trust.

Viewing the evidence in the light most favorable to the jury's verdict, however, there is also evidence from which a jury could conclude that Daniele had knowledge of the scheme, acted as Anton's "spy in the camp," and directed brokerage himself. [Here the Court notes again that new evidence from the civil trial is not considered]. Daniele lied about his knowledge of and relationship with Anton, he provided Anton with secret information about the Board's actions, he told Bridges of Midwest "you know what the program is," and he told Finch of Guaranty Trust not to "test the waters." Anton's records show numerous meetings with Daniele and his tape-recorded statements implicate Daniele directly. These co-conspirator statements were properly admitted by the district court. *See Bouriaily v. United States,* 483 U.S. 171, 176 (1987); *United States v. Townsley*, 843 F.2d 1070, 1084 (8th Cir.), reh'g en banc on other grounds, 856 F.2d 1189 (8th

Cir. 1988).

> While the evidence against the defendant was by no means overwhelming, there is substantial evidence from which a jury could reasonably infer he was guilty of the crimes charged beyond a reasonable doubt. ~ *United States v. Karunatileka*, 820 F.2d 961, 965 (8th Cir. 1987); *United States v. McCrady*, 774 F.2d 868, 874-75 (8th Cir. 1985); *United States v. Lemm*, 680 F.2d 1193, 1205 (8th Cir. 1982).

Daniele, 866 F.2d at 1056-57.

The Court of Appeals concluded by urging the district court to "consider carefully any motion for a reduction of sentence" from petitioner. *Id.* at 1057.

On a motion for a new trial, which was denied, the district court reduced petitioner's eight year sentence by one year. *United States v. Daniele*, 931 F.2d 486, 488 (8th Cir. 1991). The Eighth Circuit noted that petitioner argued, "perhaps with good reason," that his circumstances warranted a greater reduction. However, the court reasoned in part that since Daniele had, while on bond, taken hostage the police commissioner who served with him on the PPF board, the mere one-year reduction was not inappropriate. *United States v. Daniele,* 931 F.2d 486, 489 (8th Cir. 1991).

Daniele's motion for a new trial was based in large part on the outcome of the civil action against him, *Police Retirement System v. Midwest Inv. Advisory Servs.*, 706 F. Supp. 708 (E.D. Mo. 1989), *aff'd*, 940 F.2d 351 (8th Cir. 1991). Daniele was exonerated in that trial from charges of breaching his fiduciary duty to the pension fund. *Daniele,* 931 F.2d at 488. However, his arguments that the information developed in that trial constituted "newly discovered evidence" entitling him

to a new criminal trial were unavailing. *Id.* at 489.

The Court of Appeals discussed at length the ground for relief which involved the remarks of petitioner's co-defendant Anton at the close of the civil trial. In his closing argument, Anton said the following:

> Over there sits Tony Danielle [sic]. He is in this case, in count 14. I am not in that count. I am in Counts 16 and 20, which are the counts making allegations concerning me. This is the first time anywhere that anyone officially has publicly [sic] acknowledged that Tony Danielle [sic] and I did not conspire to do anything. I had no participation in his election as a trustee. You heard that before. There was no agreement that he hire nor fire Guaranty Trust Company, nor Midwest Investment. There was no agreement between Tony and I that he use only I.M. [sic] Simon as a broker. I agreed to circulate his resume for promotion, since I sincerely believed that he had an excellent police record, and deserved to be promoted. And I gave it to anyone that I thought would listen. Unfortunately, he was not promoted. Neither he, nor I had any promises or agreements that I would give him any money for doing anything, or he would give me any money for doing anything. In my opinion, he should not be liable in this case; and he should not even have been sued in this case.

Daniele, 931 F.2d at 488.

The Court of Appeals agreed with the District Court that these remarks, made in closing argument where Anton represented himself, did not constitute evidence; thus they were not "newly discovered evidence" for purposes of a new trial. *Id.* at 489.

The Court reasoned that the remarks were "purely legal arguments" and not testimony. The court relied partly on the fact that Anton refused to testify at trial, invoking his right under the Fifth Amendment: "[W]e think it highly improbable that Anton, who heretofore steadfastly refused to make any statement, would have chosen to testify sua sponte during closing arguments." *Id.*

The Court further noted this about Anton's refusal to testify: "We remain unclear why Daniele failed to challenge Anton's invocation of the privilege against self-incrimination during both the criminal and civil proceedings. Anton's guilty plea, which predated both trials, may have waived this right — at least as to matters that the guilty plea resolved." *Id.* at 488 n.2.

Finally, the Eighth Circuit rejected the argument that the civil verdict for Daniele vindicated his efforts for a new criminal trial:

> We acknowledge the civil verdict in Daniele's favor, but cannot accord it much significance because Daniele's new trial motion failed to specify the civil charges against him, their elements, or the instructions and verdict form given to the civil jury. Without such information, we cannot begin to ascertain whether evidentiary variations between the two trials seemingly caused the different verdicts.

Id. at 489.[2]

[2] Several years later, in a collateral civil proceeding the Supreme Court of Missouri en banc found that facts of the civil suit were "identical" to count XVIII of the criminal conviction. The conviction was held to have given the civil plaintiffs a "reasonable belief" in the facts they alleged. *See State ex rel Police Retirement System of St. Louis v. Mummert*, 875 S.W.2d 553, 555-56 (Mo. 1994).

III.

Relief under the writ of error coram nobis is "substantially equivalent" to relief under the more familiar writ of habeas corpus. *United States v. Camacho-Bordes*, 94 F.3d 1168, 1172-73 (8th Cir. 1996). A coram nobis petition "is of the same general character as one under 28 U.S.C. § 2255." *Id.*, quoting *United States v. Morgan*, 346 U.S. 502, 506 n.4 (1954). The principal difference is that the coram nobis petitioner is no longer in custody. *Id.* at n.6.

> A writ of coram nobis is an extraordinary remedy, and courts should grant the writ only under circumstances compelling such action to achieve justice and to correct errors of the most fundamental character. Accordingly, a petitioner must show a compelling basis before coram nobis relief will be granted, and the movant must articulate the fundamental errors and compelling circumstances for relief in the application for coram nobis.

Id. at 1173 (internal citations and quotes omitted).

Analogously then, relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and which, if uncorrected, would result in a complete miscarriage of justice. *United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996). A § 2255 motion is not a substitute for a direct appeal. *Reid v. United States*, 976 F.2d 446, 447 (6th Cir. 1992), *cert. denied*, 507 U.S. 945 (1993). It is an improper forum in which to complain about simple trial errors. *Poor Thunder v. United States*, 810 F.2d 817, 821 (8th Cir. 1987). Arguments which might warrant reversal on direct appeal will not necessarily support collateral attack.

Anderson v. United States, 25 F.3d 704, 706 (8th Cir. 1994).

In his amended petition for a writ of error coram nobis,[3] Daniele advances two essential grounds for relief. First, he argues that juror misconduct fatally prejudiced his right to a fair trial. Second, he argues that he was wrongly denied the opportunity to compel Anton's putatively exculpatory testimony. In both cases, he argues that his attorney rendered constitutionally ineffective assistance.

Claims not made on direct appeal are barred from § 2255 review unless the movant can establish both cause for this procedural default and actual prejudice resulting therefrom. *United States v. Frady*, 456 U.S. 152, 167 (1982). Under the cause and prejudice test, the "cause" must be something external to the petitioner, that cannot fairly be attributed to him. *Coleman v. Thompson*, 501 U.S. 722, 753 (1991). "Prejudice" must be so substantial that it "infect[s] his entire trial with error of constitutional dimensions." *Frady*, 456 U.S. at 170. "[I]n an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Murray v. Carrier,* 477 U.S. 478, 496 (1986). "Absent unusual circumstances, a showing of ineffective assistance of counsel satisfies both cause and prejudice." *United States v. Apfel,* 97 F.3d 1074, 1076 (8th Cir. 1996). Ineffective assistance of counsel

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[3] By order issued herewith, the undersigned has granted the motion of petitioner Daniele for leave to file an amended petition for a writ or error coram nobis (Doc. No. 42). The motion was unopposed by the government. The amended petition distilled and reduced the allegations Daniele previously made in this action.

claims are properly before the court even absent a showing of cause if (1) movant had the same counsel at trial as on appeal or, if not the same, (2) the record was not fully developed as to the ineffective assistance of counsel claim. *See Williams v. United States,* 1998 WL 410901, n.2 (S.D.N.Y. 1998).

Petitioner was entitled to assistance of counsel at trial and appeal, and on his motion for a new trial. *See Robinson v. Norris*, 60 F.3d 457 (8th Cir. 1995), *cert. denied,* 517 U.S. 1115 (1996).

To establish ineffective assistance of counsel petitioner faces "a heavy burden." *United States v. Apfel,* 97 F.3d 1074, 1076 (8th Cir. 1996). He must show that counsel's performance was unconstitutionally deficient *and* that the deficient performance prejudiced the defense, according to the polar star of ineffective assistance jurisprudence, *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If petitioner fails to prove deficient performance then proof of prejudice need not be considered, and vice versa. *United States v. Flynn*, 87 F.3d 996, 1000 (6th Cir. 1996); *Stokes v. Armontrout*, 851 F.2d 1085, 1092 (8th Cir. 1988), *cert. denied*, 488 U.S. 1019 (1989). Petitioner must show that his "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

In demonstrating that his counsel's performance fell below an objective standard of reasonableness, petitioner must overcome a strong presumption that counsel did not render constitutionally ineffective assistance, *id.* at 690; counsel is presumed to be competent and effective. *English*, 998 F.2d at 613. In overcoming this presumption, petitioner bears a heavy burden.

Bramlett v. Lockhart, 876 F.2d 644, 647 (8th Cir.), *cert. denied* 493 U.S. 941 (1989). Counsel's strategic choices made after thorough investigation are virtually unchallengeable, and decisions following less thorough, but nevertheless reasonable, investigation are to be upheld to the extent that they are supported by reasonable judgment. *Strickland*, 466 U.S. at 690-691. Counsel's conduct is to be evaluated in light of the circumstances at the time, not with the 20/20 vision of hindsight. *Id.* at 689. The correct inquiry is not whether counsel's decisions were correct or wise, but whether they were unreasonable decisions which only an incompetent attorney would adopt. *Flynn*, 87 F.3d at 1000. The Court applies an objective standard of reasonableness in making this inquiry. *Hayes v. Lockhart,* 766 F.2d 1247, 1251 (8th Cir.), *cert. denied*, 474 U.S. 922 (1985).

Second, petitioner must show that he was prejudiced by counsel's dereliction of duty. *Strickland*, 466 U.S. at 687. Petitioner must show that there is a reasonable probability — sufficient to undermine confidence in the outcome of the proceeding — that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The prejudice must not be simply a possibility, but an actual and substantial disadvantage, infecting [movant's] entire trial with error of constitutional dimensions." *Frady*, 456 U.S. at 170. This is a more difficult standard to meet than proving that the error was harmful beyond a reasonable doubt. *Garrett v. United States*, 78 F.3d 1296, 1303 (6th Cir.) , *cert. denied*, 117 S. Ct. 374 (1996).

> [A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and

> taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Strickland, 466 U.S. at 696.

"The Sixth Amendment right to counsel functions to ensure that defendants receive a fair trial, not a perfect one." *Willis v. United States*, 87 F.3d 1004, 1008 (8th Cir. 1996).

Juror Misconduct.

Petitioner Daniele argues that he has evidence of jury misconduct, and that his counsel failed to argue this in the motion for a new trial.

Daniele alleges that juror Wolz spoke to two non-jurors during the trial, at a St. Louis Cardinals baseball game and again with one of the non-jurors after the trial. Pet. at 4-5. One of the non-jurors, Mr. Rosenberger, apparently wrote a letter to Chet Pleban, Esq., in January 1995 detailing these conversations, and petitioner has submitted a copy of this letter as Petition Exh. 4. The letter reads, in relevant part:

> Mike Wolz, whom I have know for many years, was at a St. Louis Cardinal Baseball game when I seen him, and stopped to talk to him. Mike was with two other men when we met. After we greeted each other Mike said that he was on the Jury in the Tony Daniele trial, and was in the Deliberation stage of the Trial. Mike went on to say that he and the other Jurors felt that Tony was completely innocent, and

> that they were going to find Tony innocent. For several minutes Mike talked about the case, with the two other men alongside of him, they were nodding in agreement with everything that Mike was saying, and several times said "Yea". I just assumed that the other two men were Jurors also. During our conversation, I reminded Mike that he and Tony were at Thomas Scheafering's Christmas party last year, and that he spoke to Tony for some time at the party. Mike said that he forgot all about the party, but now remembered it, and remembered talking to Tony.
>
> I was shocked to hear that the Jury found Tony Guilty, especially after what Mike had told me, so I called him. Mike told me that he and the other Jurors found Tony Guilty because he did not testify in his own behalf, they held not testifying against him.

Pet. Exh. 4.

Petitioner argues that this information both proves that his trial was unfair, and that his lawyer was constitutionally deficient for not arguing it in the motion for a new trial. Daniele alleges that he did not discover this information until after his direct appeal, but told his attorney when he was preparing the Rule 33 motion for a new trial. Daniele further alleges that his attorney refused to include this in the motion, over Daniele's objections. Pet. Aff.; Pet. Mem. at 5.

As petitioner points out in his memorandum, the Eighth Circuit has held that evidence of this nature

faces the fundamental obstacle of Fed. R. Ev. 606(b)[4] which generally bars jurors from testifying as to "any matter or statement occurring during the course of the jury's deliberations." *See id.*

Petitioner must present evidence of juror misconduct that is not barred by the rule of juror incompetence and is sufficient to establish grounds recognized as adequate to overturn the verdict. *United States v. Eagle,* 539 F.2d 1166, 1169-70 (8th Cir. 1976), *cert. denied,* 429 U.S. 1110 (1977).[5]

The Supreme Court has ruled that even gross and outrageous misbehavior by jurors, including heavy drinking, drug use and trafficking, was simply not something that jurors could testify to. *Tanner v. United States,* 483 U.S. 107 (1987).

The Eighth Circuit has recently ruled on two cases relevant to petitioner's claims. In *United States v. Tran,*

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[4] Rule 606(b) states:

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

[5] A discussion of the background of the rule can be found in *Srnith v. Brewer,* 444 F.Supp. 482 (S.D.Iowa 1978), *aff'd,* 577 F.2d 466 (8th Cir.), *cert. denied,* 439 U.S. 967 (1978).

122 F.3d 670, 672-73 (8th Cir. 1997), defendant did not testify and the jury was properly instructed not to hold that against him. Two jurors later provided defendant with affidavits stating that indeed the jury did hold this against him and it was a "major argument" used among jurors for conviction. The district court held that this did not come within the Rule's exception for "extraneous prejudicial information" about which jurors may testify. The Eighth Circuit upheld the district court and rejected the arguments, reaffirming its earlier decision in *United States v. Rodriquez*, 116 F.3d 1225 (8th Cir. 1997). The court explained:

> In *Rodriquez*, the defendant sought a new trial and an evidentiary hearing based on the statement by his lawyer's secretary that "at least one juror" had told her after the trial that "Rodriquez's failure to testify was discussed during deliberations." *Id.* at 1226. This court rejected Rodriquez's argument that "since his failure to testify was not evidence and should not have been considered, it should be considered an 'outside influence' about which the jurors should be allowed to testify." *Id.* at 1226-27. In language equally applicable to the present case, the court explained: That Rodriquez did not testify is not a fact the jurors learned through outside contact, communication, or publicity. It did not enter the jury room through an external, prohibited route. It was part of the trial, and was part of the information each juror collected. It should not have been discussed by the jury, and indeed was the subject of a jury instruction to that effect. But it was not "extraneous [prejudicial] information," and therefore does not fall within the exception outlined in Rule 606(b). Accordingly, members of the jury

> are prohibited by Rule 606(b) from testifying about their deliberations or impeaching their verdict.
>
> In the present case, Tran's failure to testify also was not "extraneous prejudicial information" because it was known to the jurors as a result of their presence at the trial, not as a result of something disclosed to them that had not occurred in the courtroom. The present case, therefore, is unlike *United States v. Swinton*, 75 F.3d 374 (8th Cir. 1996), upon which Tran relies, because there a juror had stated during jury deliberations that the defendant had a prior conviction — a fact that, although correct, had not been brought out at the trial. As this court stated in *Rodriquez*, citing *Swinton*, "A prior-conviction of a defendant, for example, when not admitted as evidence at trial, but which nonetheless entered into the jury's deliberations through personal knowledge of a juror, has been held to be 'extraneous prejudicial information.'" *Rodriquez*, 116 F.3d at 1227. Here, as in *Rodriquez*, "[t]he district court did not err in denying [Tran] a new trial or an evidentiary hearing."

Tran, 122 F.3d at 673. *See also United States v. Pavon*, 618 F.Supp. 1245 (S.D. Fla. 1985), *aff'd*, 802 F.2d 1397 (11th Cir. 1986).

Indeed, this has been the law in this Circuit for some time, *see, e.g., Stout v. United States*, 227 F. 799 (8th Cir. 1915) (jurors cannot testify regarding allegation that they improperly considered defendant's failure to testify).

Petitioner acknowledges these cases but argues that his interest lies in having Mr. Rosenberger testify as to what he heard. This would all be outside of the jury

deliberations of course, and as Rosenberger was not a juror, no Rule 606(b) prohibition applies to him. Pet. Mem. at 9-11. Petitioner argues that nothing prohibits the introduction of testimony from an outsider regarding outside contact by a juror. Petitioner does not explain, however, how to resolve the hearsay issue such an affidavit would suggest.

In *Rodriquez,* an outside party, defendant's attorney's secretary, affirmed that jurors told her of their improper negative inference of defendant's refusal to testify, and such a statement was not accepted by the court. *Rodriquez*, 116 F.3d at 1226.

> Federal Rule of Evidence 606(b) generally precludes the testimony of any juror regarding intrajury communications, as well as the testimony of a nonjuror regarding an intrajury statement. *See Scogin v. Century Fitness, Inc.*, 780 F.2d 1316, 1318-20 (8th Cir. 1985) (precluding testimony from court bystander that a juror confided that the jury had reached a quotient verdict); 27 C. Wright and V. Gold, Federal Practice and Procedure S 6074 at 416 (1990) (Rule 606(b) has been interpreted to exclude "all manner of juror statements, whether conveyed directly to the court by the juror or indirectly through a witness who overheard the statement").

United States v. Caldwell, 83 F.3d 954, 956 (8th Cir. 1996).

Similarly, in. *Poches v. J.J. Newberry Co.,* 549 F.2d 1166 (8th Cir. 1977), defendant sought to introduce an affidavit from an airplane passenger who spoke to the jury foreman after trial; while the parties argued the merits without raising Rule 606(b), the court sua sponte noted its doubt that the affidavit would be admissible.

In *Leisure v. Bowersox*, 990 F.Supp. 769, 786-787, 816 (E.D. Mo. 1998), defendant provided the habeas court with an affidavit from a juror attesting to irregularities between the trial court's instructions and her application of them, in considering defendant's guilt and sentence of death. The court refused to consider it, stating that "[t]estimony by juror Denardo about her misunderstanding of an instruction is inadmissible pursuant to Fed. R. Evid. 606(b)." *Id.* at 816. Moreover, the court refused to consider an affidavit from the juror's priest attesting to what the juror told him. *Id.*

The Eighth Circuit has very recently given extended examination to the question of juror misconduct, in *United States v. Tucker*, 137 F.3d 1016. Defendant, then Governor of Arkansas, was granted an evidentiary hearing by the Court of Appeals because one of the jurors allegedly was related to people who had well-known and personal hostility for the defendant.

To the extent that petitioner argues he was presumptively prejudiced by the admittedly improper contact between Rosenberger and Juror Wolz, the Court of Appeals has held that the "ultimate question" is: "Did the intrusion affect the jury's deliberations and thereby its verdict?" *Id.* at 1030. Even accepting all of petitioner's assertions as true and considering any reasonable inferences therefrom, petitioner does not suggest, much less show, that the conversation between Wolz and Rosenberger had or could have had any prejudicial effect on petitioner. "In sum, the depth of investigation required depends on both the gravity of the alleged misconduct and the substantiality of the movant's showing of misconduct." *Id.* at 1031.

Not every outside contact by a juror is presumed prejudicial, *United States v. Blumeyer*, 62 F.3d 1013,

1016-1017 (8th Cir. 1995), *cert. denied*, 516 U.S. 1172 (1996), and not every contact requires a hearing. *See United States v. Cunningham*, 133 F.3d 1070, 1075-76 (8th Cir.), *cert. denied* 118 S.Ct. 1823 (1998).

Nor does petitioner suggest another kind of impropriety, that of "intense emotional pressure brought to bear on one juror." *Tucker*, 137 F.3d at 1032.

Bearing in mind the very difficult burden required to establish ineffective assistance of counsel, the undersigned cannot say that petitioner's attorney's refusal to argue this matter on the new trial motion was constitutionally deficient. The Eighth Circuit stated the following regarding the problem of selecting appellate arguments:

> In deciding whether to appeal the hearsay issue as well, Garrett's counsel was presented with substantial, recent, and at least facially contrary authority from this Circuit. The selection and "winnowing" of which issues to bring on appeal is a "hallmark of effective advocacy"; counsel is not required to raise every conceivable issue on appeal. *See Charron v. Gammon*, 69 F.3d 851, 858 (8th Cir. 1995) (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)); *Blair v. Armontrout*, 976 F.2d 1130, 1139 (8th Cir.1992), *cert. denied*, 508 U.S. 916 (1993) (quoting *Jones v. Barnes*). Our observations in *Simmons v. Lockhart*, 915 F.2d 372 (8th Cir.1990), are appropriate here:
>
> Certainly previously appointed counsel might have chosen to press this issue on appeal, and such a choice would have been reasonable. It does not follow that the opposite choice — to drop the issue — was unreasonable. Law is an art, not a science,

> and many questions that attorneys must decide are questions of judgment and degree. Among the most difficult are decisions as to what issues to press on appeal. . . . It is possible to criticize his choice in hindsight. Perhaps a choice to press the issue would have been better. But we are dealing, after all, with fallible human beings, and a demand for perfection . . . cannot be met. *Id.* at 375.

Garrett v. United States, 78 F.3d 1296, 1306 (8th Cir.), *cert. denied*, 117 U.S. 374 (1996).

Anton's Invocation of the Fifth Amendment.

Petitioner Daniele argues that his attorney rendered ineffective assistance of counsel by failing to test before the trial judge Anton's invocation of the privilege against self-incrimination. Daniele argues that Anton had relinquished the privilege by his guilty plea and that Anton, had he been compelled to testify, would have given exculpatory testimony on petitioner's behalf. This ineffective assistance, petitioner argues, resulted in his being deprived of his Sixth Amendment right of compulsory process to obtain witnesses. In arguing a claim of ineffective assistance, petitioner is asserting an independent Sixth Amendment violation.

"The decision whether to call witnesses is normally a judgment by counsel which the courts do not second-guess." *Williams v. Carter*, 76 F.3d 199, 200 (6th Cir. 1996), citing *Sherrill v. Wyrick*, 524 F.2d 186,188 190 (6th Cir.1975), *cert. denied*, 424 U.S. 923 (1976).

To begin with, as petitioner points out in his memorandum, a defendant's Sixth Amendment right to compulsory process must yield to a witness's properly invoked right to be free from compelled self-incriminating

testimony, *United States v. Habbab,* 132 F.3d 410, 416 (8th Cir. 1997). It "does not include the right to compel a witness to waive his Fifth Amendment privilege." *United States v. Carr,* 67 F.3d 171, 176 (8th Cir 1995). "To establish a violation of the Compulsory Process Clause, a criminal defendant must make a plausible showing that the district court, without justification, excluded the testimony of a witness that would have been material and favorable to his defense." *United States v. Robaina,* 39 F.3d 858, 852 (8th Cir. 1994).

The invocation of the Fifth Amendment is meant to protect a witness from "real dangers, not remote and speculative possibilities." *Zicarelli v. Investigation Comm'n,* 406 U.S. 472, 478 (1972).

It is well-settled that the court determines the validity of a Fifth Amendment invocation by a witness. As explained in *Hoffman v. United States,* 341 U.S. 479 (1951):

> The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. The witness is not exonerated from answering merely because he declares that in doing so he would incriminate himself — his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified . . . and to require him to answer if it clearly appears to the court that he is mistaken. However, if the

> witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim must be governed as much by his personal perception of the peculiarities of the cases as by the facts actually in evidence.

341 U.S. at 486-487 (citations and quotes omitted).

In *Reina v. United States*, 364 U.S. 507, 513 (1960), the Supreme Court described the "ordinary rule . . . that once a person is convicted of a crime, he no longer has the privilege against self-incrimination as he can no longer be incriminated by his testimony about said crime." However, in *Malloy v. Hogan*, 378 U.S. 1, 12, 14 (1964) the Court said that a witness could properly invoke the Fifth Amendment when queried "about the circumstances surrounding his arrest and conviction [on a guilty plea] . . . if it was 'evident from the implications of the question[s], in the setting in which [they were] asked, that a responsive answer to the question[s] . . . might be dangerous because injurious disclosure could result,'" (quoting *Hoffman*, 341 U.S. at 486-87). In *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 (1964), the Court states that the trial court should not generally allow a witness to testify on direction examination if the court has adequate reason to believe the witness will properly invoke the Fifth Amendment on cross-examination.

The Eighth Circuit has held in a death penalty case that an attorney's decision to not call a witness who advised that he would invoke the Fifth Amendment was not ineffective assistance. *Battle v. Delo,* 19 F.3d 1547, 1555-56 (8th Cir. 1994), *adhered to on reconsideration,* 64 F.3d 347 (8th Cir. 1995), *cert. denied* 517 U.S. 1235 (1996).

> This is consistent with *Strickland,* 466 U.S. at 690, in which the Supreme Court ruled strategic decisions "made after thorough investigation of law and facts . . . are virtually unchallengeable," even if that decision later proves unwise. *See Novak v. Purkett,* 4 F.3d 625, 628 (8th Cir. 1993) (failure to call witness to testify because he had a prior conviction and because of trial counsel's assessment of his witness' emotional state was not deficient performance); *Sanders v. State,* 738 S.W.2d 856, 860 (Mo. banc 1987) (decision not to call co-defendant to testify was reasonable and "not clearly beyond the bounds of prevailing professional norms").
>
> . . .
>
> However, in this circuit an attorney's performance may be held ineffective if he fails to investigate or investigates inadequately. *Chambers v. Armontrout,* 907 F.2d 825, 828-31 (8th Cir.) (en banc), *cert. denied,* 498 U.S. 950 (1990). "Counsel must exercise reasonable diligence to produce exculpatory evidence and strategy resulting from lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel." *Kenley,* 937 F.2d at 1304 (citing *Elridge v. Atkins,* 665 F.2d 228, 235-37 (8th Cir. 1981), *cert. denied,* 456 U.S. 910 (1982)). The appellant must overcome a heavy pre-

> sumption that counsel was competent. *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065.

Id. at 1555-56, 1555 n.4.

By contrast, the habeas case of *Schlup v. Delo*, 513 U.S. 298 (1995), turned on substantial measure on the deficient performance of counsel who failed to investigate witnesses and who, as the dissent from the Eighth Circuit pointed out, "did not compel the testimony of those who refused to testify." *Schlup v. Delo,* 11 F.3d 738, 747 (8th Cir. 1995) (Heaney, J., dissenting). An important issue there, however, was that "Schlup received only a two-day trial. Had trial counsel presented the exculpatory eyewitnesses now presented, the jury would have received the full picture of Dade's murder and if it were to credit the new evidence, it would have no choice but to acquit." *Id.* at 750 n.8. These eyewitnesses were questioned by a guard to find out if they saw anything, requiring them to "snitch" on another inmate if they did. It was self-evident that there was no witness protection in the prison — the murder in question took place in the "super-max" security area. When the witnesses were eventually questioned by the defense, they indicated that they would invoke the Fifth Amendment; hardly surprising in light of being questioned in the very presence of the prisoner they would later identify as the killer. *See Schlup*, 11 F.3d at 745, 753 nn. 11, 13 (Heaney, J., dissenting).

In *Eldridge v. Atkins*, 665 F.2d 228, 235 (8th Cir. 1981), counsel was found ineffective when he relied on a secondhand report that a material witness would invoke the Fifth Amendment, and based upon that, failed to call him. The Court of Appeals held that counsel should have at least subpoenaed the witness to allow the court to persuade the witness to testify. "When a

man's liberty is at stake, counsel owes a greater duty than to simply accept someone's hearsay statement that the witness would rather not testify." *Id.* However, a key element in that case was the argument that defendant was a victim of mistaken identity and that the real culprit was a look-alike for the defendant and well-known to certain witnesses.

Counsel was found ineffective in a recent, similar case of alleged mistaken identification, *Mitchell v. Henry*, 1997 WL 711055 (N.D. Cal. 1997), *aff'd* 1998 WL 446182 (9th Cir. 1998) (table). There, the district court granted a writ of habeas corpus for a prisoner whose attorney failed to investigate an identity witness. Regardless of the witness's likelihood of testifying, it was held to be deficient for counsel to fail to investigate the possible testimony of the witness. *Id.*

While Schlup's, Mitchell's and Eldridge's defenses were of complete mistaken identity (all had evidence of look-alike perpetrators) and proof of that was withheld from the trial because of incompetent counsel failing to press recalcitrant witnesses, petitioner does not present the same argument. At its utmost petitioner Daniele's case could have been aided by Anton's putative testimony that petitioner was never a conspirator. Short of that, Anton might have testified that Daniele did not know details of the scheme, or did not participate in it, or, perhaps, played a role that was, in Anton's opinion, insignificant or irrelevant. In no case could petitioner have used Anton's testimony to argue some kind of mistaken identity, or that petitioner was never involved in the transactions and communications in evidence. Nor could Anton have testified as to the conversations between petitioner and one other party, where petitioner allegedly made statements suggestive of his sup-

port of the conspiracy. And finally, whatever exculpatory testimony Anton might have given would have been weighed by the jury for its credibility; since this issue involved petitioner's intent, not his presence *vel non* at a crime scene, it cannot be fairly said that such testimony would have necessarily thrown grave doubt upon the government's evidence.

More recently, this court has addressed the issue of failure to call an exculpatory witness, in the death penalty habeas case of *Leisure v. Bowersox*, 990 F.Supp. 769, 821-22 (E.D. Mo. 1998). There, the habeas court agreed with the Missouri court that a decision not to call an uncooperative witness who would allegedly have invoked the Fifth Amendment fell within the discretion permitted under *Strickland*, and did not constitute ineffective assistance. The petitioner failed to show that the witness would have testified if called, and would have provided a viable defense. *Leisure*, 990 F.Supp. at 822. In the case at bar, while petitioner has offered evidence that Anton could have aided the defense with testimony along the lines of his civil closing argument, he nonetheless fails to show that Anton would have cooperated if he had been forced to justify his invocation of the Fifth Amendment.

> We have held that a representation to the district court by a witness's counsel that the witness would exercise his Fifth Amendment rights if called to testify is sufficient for the district court to refuse to compel that witness to appear. See *United States v. Swanson*, 9 F.3d 1354, 1359 (8th Cir. 1993) (district court's exclusion of testimony by witness not improper when witness's attorney informed court that witness would assert Fifth Amendment right of self-incrimination if called).

United States v. Warfield, 97 F.3d 1014, 1019-20 (8th Cir. 1996), *cert. denied sub nom. Thomas v. United States*, 117 S.Ct. 1119 (1997).

A survey of relevant decisions shows the difficulty of establishing ineffective assistance for failure to object to a witness's invocation of the Fifth Amendment.

In *United States v. Sapp*, 989 F.Supp. 1093, 1099 (D.Kan. 1997), ineffective assistance was not established, when counsel failed to call witnesses who were planning to invoke the Fifth Amendment, and as a result the court stated that "it seems very unlikely that the defendants would have obtained any helpful testimony."

In *Mestering v. United States*, 1997 WL 528047 (S.D.N.Y. 1997) a § 2255 case, ineffective assistance was not established where defendant's attorney decided not to call a witness who advised that he would invoke the Fifth Amendment, even though the attorney "believed he could have compelled [the witness] to take the stand for certain lines of inquiry." *Id.* at *6. In light of the witness's refusal to cooperate, the attorney feared that any testimony might damage his client's defense.

In *United States v. Galleco,* 944 F.Supp. 309, 317-21 (S.D.N.Y. 1996), in the murder of a Post Office driver, ineffective assistance was riot established where counsel failed to call witnesses who were not cooperative. "Decisions to call or bypass particular witnesses, which have been recognized to be peculiarly a matter of professional judgment, are 'practically never second-guess[ed].'" *Id.* at 319. In this case, however, the evidence against the defendant was considered to be "overwhelming." *Id.* at 313.

In *United States v. Stevens*, 978 F.2d 565, 568 (10th Cir. 1992), ineffective assistance was not established where counsel failed to move for severance where there was no credible evidence that co-defendant was willing to waive his Fifth Amendment rights in order to exculpate defendant. In addition, counsel had even been disbarred a week before trial.

In *Resnover v. Pearson*, 965 F.2d 1453, 1461 (7th Cir. 1992), *cert. denied*, 508 U.S. 962 (1993), a death penalty case (murder of a policeman), ineffective assistance was not established where counsel failed to call an allegedly exculpating eyewitness who was at one time a co-defendant. The witness was prepared to invoke Fifth Amendment and fear of incrimination was "not fanciful." Thus, the court and counsel did not need to require the witness to justify invocation.

In *Drew v. Collins*, 964 F.2d 411, 422-23 (5th Cir. 1992), *cert. denied*, 509 U.S. 925 (1993), (death penalty), ineffective assistance not established where counsel did not call a witness when he was advised that the witness would invoke the Fifth Amendment.

In *People of the Territory of Guam v. Santos*, 741 F.2d 1167, 1169 (9th Cir. 1984), ineffective assistance was not established where counsel failed to call a witness who invoked, and no error where court did not examine witness for justification of invocation; "a tactical decision by counsel with which the defendant disagrees cannot form the basis of a claim of ineffective assistance of counsel." Citing *Strickland*, 104 S.Ct. at 2066. However, here again the court found "overwhelming evidence of guilt."

In *Yarrington v. Davies* 779 F.Supp. 1304 (D.Kan. 1991), *aff'd*, 992 F.2d 1077 (10th Cir. 1993) (1st degree

murder), ineffective assistance was not found even where counsel repeatedly misstated the burden of proof and failed to object to hearsay statements attributed to the witness who invoked the Fifth Amendment. The court did not find ineffective assistance although it was "troubling because petitioner was convicted on circumstantial evidence and a principal witness invoked" the Fifth Amendment. Counsel carefully and thoroughly questioned the testifying witnesses. *Id.* at 1308.

In *Daniels v. Maggio*, 669 F.2d 1075 (5th Cir.), *cert. denied*, 459 U.S. 968 (1982), ineffective assistance was not established where counsel failed to object to a witness's invocation of the Fifth Amendment, to insist on an examination to justify the invocation. There, even though the counsel team was primarily made up of Tulane University law students, the mishandling of the witness amounted to no more than a unexpected tactical decision, which did not constitute ineffective assistance, even where "in retrospect it is apparent that counsel chose the wrong course." *Id.* at 1080.

In *Little Rock School District v. Borden, Inc.*, 632 F.2d 700, 704 (8th Cir. 1980), the Court of Appeals analyzed a district court decision compelling testimony from witnesses based on immunity and previous conviction grounds. One of the initial determinations of the trial court was that the witnesses could properly invoke the Fifth Amendment in a civil case related to price-fixing for which the witnesses had already been convicted, because "the civil action was broader in both geographic scope and time than were the prior criminal convictions." This determination was superseded by the trial court on a finding of immunity; the Court of Appeals cautiously allowed the compulsion of testimony where the order to compel was precisely restricted to those

matters about which the witnesses had testified before the grand jury, or for which the witnesses had been prosecuted. *Id.* at 706. However the Eighth Circuit was careful to note that the witnesses could have invoked the Fifth Amendment on other matters and the court could not rely on the "carefully circumscribed statement" of the government suggesting that the witnesses would not be prosecuted for new crimes. *Id.* at 704.

In the case at bar, if Anton had been compelled to testify for Daniele and then invoked the Fifth Amendment upon cross-examination by the government, all of his testimony might have been stricken. *United States v. Doddington*, 822 F.2d 818, 622 (8th Cir. 1987).

The undersigned is mindful of the question implicit in footnote 2 of *United States v. Daniele*, 931 F.2d at 488 — why did petitioner, through his attorney, not challenge Anton's invocation of the Fifth Amendment? "Anton's guilty plea, which predated both trials, may have waived this right — at least as to matters that the guilty plea resolved." *Id.* While the decisions are mixed on whether and when a co-defendant who pleads guilty retains his right to invoke the Fifth Amendment, it appears that the better rule is to permit the invocation.

The Eighth Circuit has recently spoken to this issue, while declining to decide directly the question of the pre-sentencing, post-guilty plea invocation of the Fifth Amendment by a co-defendant:

> Fidel Velasquez argues that the district court erred in refusing to compel Juan Velasquez to testify at his trial over Juan Velasquez' assertion of his Fifth Amendment privilege against self-incrimination. In the alternative, Fidel Velasquez contends that the district court abused its discretion in declining

to continue his trial until after Juan Velasquez' sentencing so that Juan Velasquez could testify. On both front, we disagree.

Juan Velasquez could have subjected himself to new criminal charges, not only for conspiracy to commit the charged offense but also for unrelated crimes, by testifying at Fidel Velasquez' trial. Moreover, he remained susceptible to state charges for the same acts to which he had pled guilty in federal court. *See United States v. L.Z.*, 111 F.3d 78, 79 (8th Cir. 1997) (indicating that dual prosecutions by dual sovereigns are constitutional). Juan Velasquez' plea of guilty to a federal charge in Missouri did not waive his Fifth Amendment privilege as it relates to other charges. *See United States v. Mejia-Uribe*, 75 F.3d 395, 399 (8th Cir.), *cert. denied*, 117 S.Ct. 151 (1996). Thus, Juan Velasquez properly asserted the Fifth Amendment. [footnote 3]

[Footnote 3]. [In addition to the danger of new charges, Juan Velasquez' testimony could have adversely affected his position at sentencing by reflecting upon his role in the offense and his acceptance of responsibility. The other circuit courts of appeals are split regarding whether such a defendant who has been convicted or who has pled guilty retains a Fifth Amendment privilege against self-incrimination until he has been sentenced. *Compare United States v. Kuku*, 129 F.3d 1435, 1438 (11th Cir. 1997), *with United States v. Mitchell*, 122 F.3d 185, 191 (3d Cir. 1997), *cert. granted*, 118 S.Ct. 2318 (U.S. June 15, 1998). We have not passed on this issue. We believe that the conclusion that Juan Velasquez' testimony could have exposed him to additional criminal charges suffices to establish

> that he enjoyed a Fifth Amendment privilege not to testify at Fidel Velasquez' trial. Thus, we decline to address the ramifications of the fact that Juan Velasquez' testimony could have negatively affected him at sentencing].
>
> It appears, then, that a genuine conflict arose between Fidel Velasquez' right to compulsory process and Juan Velasquez' privilege to be free of self-incrimination. We have not embraced the balancing test used by the District of Columbia Circuit Court of Appeals in *United States v. Pardo*, 636 F.2d 535, 544 (D.C.Cir. 1980), upon which Fidel Velasquez relies. Rather, it is well settled in our precedent that, in cases like the case at bar, the Sixth Amendment right of an accused to compulsory process gives way to the Fifth Amendment privilege of a potential witness to be free of self-incrimination. *United States v. Habbab*, 132 F.3d 410, 416 (8th Cir. 1997). Thus, the district court did not err in refusing to compel Juan Velasquez' testimony.

United States v. Velasquez, 141 F.3d 1280, 1282 (8th Cir. 1998), *pet. for cert. filed* June 20, 1998, No. 98-5296.

As the Eighth Circuit noted, *United States v. Kuku*, 129 F.3d 1435, 1438 (11th Cir. 1997), *cert. denied*, 118 S.Ct. 2071 (1998) is directly at odds with *United States v. Mitchell*, 122 F.3d 185, 191 (3d Cir. 1997) *cert. granted*, 118 S.Ct. 2318 (1998). The Third Circuit in *Mitchell* reasoned that it is true that just as a defendant retains her Fifth Amendment right as to offenses for which she has not yet been convicted, a defendant's plea of guilty to one offense does not by its own force . . . waive a privilege with respect to other alleged transgressions." *Id.* at 190. However, the court found no basis "for

holding that the self-incrimination that is precluded extends to testimony that would have an impact on the appropriate sentence for the crime of conviction." *Id.* at 191.

The Eleventh Circuit in *Kuku*, by contrast, reasoned that it found the holdings of the First, Fifth, and D.C. Circuits persuasive on the issue and that it was proper to find a continuing right to the privilege for a person awaiting sentencing. *Id.* at 1437-38.

In Daniele's case, it is likely that the trial judge would have sustained Anton's invocation of the privilege, had Daniele's counsel tested it before the court. *United States v. De La Cruz*, 996 F.2d 1307, (1st Cir.), *cert. denied*, 510 U.S. 936 (1993). *See also*, *United States v Hernandez*, 962 F.2d 1152, 1161 (5th Cir. 1992); *United States v. Arnott*, 704 F.2d 322, 324-25 (6th Cir.), *cert. denied*, 464 U.S. 948 (1963); *United States v. Domenech*, 476 F.2d 1229 (2nd Cir.), *cert. denied*, 414 U.S. 840 (1973); *Coile v. United States*, 100 F.2d 806, 807 (5th Cir. 1939).

The Eighth Circuit has held that a defendant retains his right against self-incrimination until his conviction is affirmed on appeal, or until time for appeal has passed. *United States v. Duchi*, 944 F.2d 391, 394-95 (8th Cir. 1991).[6] This appears to apply equally to convic-

[6] This holding was sparked by defendant's reliance on his counsel's mistaken advice that he had no further right to invoke the Fifth Amendment after his conviction, but that any testimony he gave in his girlfriend's trial would not be held against him in the event that he was retried if his pending appeal were successful. Unfortunately for him, his attorney was wrong on both counts. Indeed, he did testify to incriminating facts, and he did win his appeal and was retried, and that testimony was used against him.

(Footnote 6 continued on next page)

tions entered on guilty pleas. *United States v. Gierde*, 110 F.3d 595, 603 (8th Cir.), *cert. denied*, 118 S.Ct. 367 (1997). Although Anton did not appeal his conviction, *see Anton*, No. 4:94 CV 1877 GFG at 1, at the time of Daniele's trial he had the right to invoke his privilege.

In conclusion, the record establishes that petitioner Daniele's trial counsel did not render ineffective assistance of counsel by failing to test Anton's invocation of the Fifth Amendment privilege against self-incrimination.

Therefore, for the reasons provided above,

IT IS HEREBY RECOMMENDED that the first amended petition of Anthony Daniele for a writ of error coram nobis be denied. Any pending motion should be denied as moot.

The parties are advised that they have ten days in which to file written objections to this Report and recommendation. The failure to file timely, written objections will waive the right to appeal issues of fact.

/s/ David D. Noce
UNITED STATES
MAGISTRATE JUDGE

Signed this 30th day of September, 1998.

(Footnote 6 continued)

It was admissible because, even though he detrimentally relied on counsel, the court warned him that he need not testify; thus, his statements were voluntary. Counsel, however, was later held to have acted within the *Strickland* standards, and was not ineffective. *Duchi v. United States*, 46 F.3d 1135, 1995 WL 55179 (8th Cir.) (table), *cert. denied*, 516 U.S. 852 (1995).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-4138

Anthony Daniele,
Appellant,

v.

United States of America,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri.

[UNPUBLISHED]

Submitted: October 1, 1999
Filed: October 18, 1999

Before BOWMAN, FAGG, and MURPHY, Circuit Judges.

PER CURIAM.

Anthony Daniele appeals the district court's denial of his petition for writ of error coram nobis, *see* 28 U.S.C. § 1651(a), alleging ineffective assistance of trial counsel. Daniele asserts his defense counsel should have sought compulsion of testimony from Daniele's codefendant even though the codefendant claimed he would assert his Fifth Amendment privilege if called. Having carefully reviewed the parties' briefs and the record, we affirm for the reasons set out in the magistrate judge's thorough report and recommendation as adopted by the district court. *See* 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:95CV1658 (CEJ)

ANTHONY DANIELE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ORDER

[Filed: December 3, 1998]

This matter is before the Court upon the first amended petition of Anthony Daniele for a writ of error coram nobis. In his petition, Daniele asserts two grounds for relief: (1) that he was denied a fair trial due to juror misconduct and (2) that he was denied effective assistance of counsel by reason of his attorney's failure to determine whether petitioner's co-defendant would invoke the privilege against self-incrimination if called as a defense witness.

Pursuant to 28 U.S.C. § 636(b), the Court referred the petition to United States Magistrate Judge David D. Noce for a recommended disposition. On September 30, 1998, Judge Noce filed a Report and Recommendation in which he recommended that the first amended petition be denied and that all pending motions be denied as moot. On October 21, 1998 petitioner Daniele filed objections to the Report and Recommendation. In the objections, Daniele challenges only Judge Noce's analy-

sis of his ineffective assistance of counsel claim; he does not object to the portion of the Report and Recommendation that concerns the juror misconduct claim.

The Court has carefully examined Judge Noce's detailed and thorough analysis as well as the petitioner's claims and objections. Following *de novo* review of the record.

IT IS HEREBY ORDERED that the Report and Recommendation of United States Magistrate Judge David D. Noce is sustained, adopted and incorporated herein.

IT IS FURTHER ORDERED that the first amended petition of Anthony Daniele for a writ of error coram nobis is denied and that all pending motions are denied as moot.

/s/ Carol E. Jackson
CAROL E. JACKSON
UNITED STATES
DISTRICT JUDGE

Dated this 3rd day of December, 1998.